(3)

Supreme Court, U.S.
FILED
SEP 7 1994
OFFICE OF THE CLERK

No. 94-169

In The

Supreme Court of the United States

October Term, 1994

TOM SWANNER, d/b/a WHITEHALL PROPERTIES,

Petitioner,

v.

ANCHORAGE EQUAL RIGHTS COMMISSION, PAUL L. CONNERTY, EXECUTIVE DIRECTOR, ex rel. JOSEPH BOWLES, WILLIAM F. HARPER, and DEE MOOSE,

Respondents.

Petition For A Writ Of Certiorari To The Supreme Court Of The State Of Alaska

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

KEVIN GILBERT CLARKSON
PERKINS COIE
1029 West Third Avenue
Suite 300
Anchorage, Alaska 99501
(907) 279-8561

Attorney for Petitioner

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

15 pp

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

ARGUMENT 1

I. THE ALASKA COURT'S DECISION DOES NOT REST UPON ADEQUATE STATE GROUNDS SUFFICIENT TO SUSTAIN THE JUDGMENT INDEPENDENT OF FEDERAL LAW 1

II. THERE IS SIGNIFICANT CONFLICT, DIRECT AND IN PRINCIPLE, BETWEEN THE ALASKA COURT'S DECISION AND THE DECISIONS OF COURTS FROM OTHER STATES SUFFICIENT TO WARRANT REVIEW BY THIS COURT 3

III. CONGRESS PROPERLY ENACTED RFRA PURSUANT TO ITS LEGISLATIVE POWER UNDER SECTION 5 OF THE FOURTEENTH AMENDMENT 6

A. Respondents' Challenge To RFRA's "overruling" Of *Smith* Is Misconceived 6

B. Respondents' Challenge To Congress' Power To Enact RFRA Is Incorrect 7

CONCLUSION 10

TABLE OF AUTHORITIES

Page

CASES

Attorney General v. Desilets, 636 N.E.2d 233 (Mass. 1994) 4

Board of Educ. v. Mergens, 496 U.S. 226 (1990) 8

Cantwell v. Connecticut, 310 U.S. 296 (1940) 7

City of Cleburne v. Cleburne Living Center, 473 U.S. 532 (1985) 9

Cohen v. Cowles Media Co., 501 U.S. 663 (1991) 6

E.E.O.C. v. Wyoming, 460 U.S. 226 (1983) 8

Employment Division v. Smith, 494 U.S. 872 (1990) .. 3, 4, 5

Ex Parte Virginia, 100 U.S. 339 (1879) 7

Fullilove v. Klutznick, 448 U.S. 448 (1980) 8

Herb v. Pitcairn, 324 U.S. 117 (1945) 1

Illinois v. Gates, 462 U.S. 213 (1983) 6

Ivan Allen Co. v. United States, 422 U.S. 617 (1975) 5

Katzenbach v. Morgan, 384 U.S. 641 (1966) 7, 8

Lassiter v. Northampton County Bd. of Election, 360 U.S. 45 (1959) 8

Marbury v. Madison, 5 U.S. 137 (1803) 9, 10

Massachusetts Board of Retirement v. Murgia, 427 U.S. 307 (1976) 8

Metro Broadcasting, Inc. v. F.C.C., 497 U.S. 547 (1990) 8

Minnesota v. French, 460 N.W.2d 2 (Minn. 1990) 4

TABLE OF AUTHORITIES – Continued

Page

Minnesota v. Hershberger, 462 N.W.2d 393 (Minn. 1990) 4

Mississippi University for Women v. Hogan, 458 U.S. 718 (1982) 9

Missouri ex rel. Southern R. Co. v. Mayfield, 340 U.S. 1 (1950) 3

Ohio v. Johnson, 467 U.S. 493 (1984) 2

Oregon Dept. of Fish & Wildlife v. Klamath Tribe, 473 U.S. 753 (1985) 5

Oregon v. Mitchell, 400 U.S. 112 (1970) 8

Perkins v. Benquet Cons. Min. Co., 342 U.S. 437 (1952) 3

Richmond v. J.A. Croson Co., 488 U.S. 469 (1989) 8

Saxbe v. Washington Post Co., 417 U.S. 843 (1974) 5

Sherbert v. Verner, 374 U.S. 398 (1963) 2, 3, 4, 5

Smith v. Commission of Fair Empl. & Hous., 25 Cal. App. 4th 251, 30 Cal. Rptr. 2d 395, *mod. reh'g den.*, 1994 Cal. App. LEXIS 649 (Cal. App. 1994) 4, 5, 6, 7

United States v. National Bank of Commerce, 472 U.S. 713 (1985) 5

Wengler v. Druggists Mut. Ins. Co., 446 U.S. 142 (1980) 9

Widmar v. Vincent, 454 U.S. 263 (1981) 9

Wisconsin v. Yoder, 406 U.S. 205 (1972) 2, 3, 4, 5

Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562 (1977) 1, 2, 3

TABLE OF AUTHORITIES – Continued

Page

STATUTES AND OTHER AUTHORITIES

U.S. Constitution Article VI 1

U.S. Constitution Amendment XIV 7, 8, 9, 10

20 U.S.C. §§ 4071 *et seq.* 8, 9

42 U.S.C. § 2000e-2 9

42 U.S.C. § 2000bb 1

42 U.S.C. § 2000bb(a) 3

42 U.S.C. § 2000bb-1(a) 3

42 U.S.C. § 2000bb-1(b) 3

42 U.S.C. §§ 12101 *et seq.* 9

Sup. Ct. R. 10.1(b) 5

Sup. Ct. R. 10.1(c) 6

Senate Report (Jud. Comm.) No. 103-111 *reprinted in* 1993 U.S. Code, Cong. & Ad. News 1892 6

Justice O'Connor, *Our Judicial Federalism*, 35 Case W. Res. L. Rev. 1 (1984) 1, 2

L. Tribe, *American Constitutional Law* (2d ed. 1988) 9

ARGUMENT

I. THE ALASKA COURT'S DECISION DOES NOT REST UPON ADEQUATE STATE GROUNDS SUFFICIENT TO SUSTAIN THE JUDGMENT INDEPENDENT OF FEDERAL LAW

The Alaska Supreme Court's decision is not based upon independent and adequate state grounds because in reaching its judgment the lower court rejected Swanner's state constitutional arguments and decided that there is a compelling government interest which overrides Swanner's right to the free exercise of religion under the Religious Freedom Restoration Act of 1993 ("RFRA").[1] Because the Alaska Court rejected Swanner's state constitutional arguments, under the Supremacy Clause[2] the federal questions regarding the First Amendment and RFRA are an essential and mandatory portion of the Alaska Court's decision which predominate its judgment. Because the federal questions predominate, the Alaska Court's judgment will not stand if this Court reverses on the federal questions. The Alaska Court cannot obviate this Court's review of Swanner's federal Constitutional and statutory rights simply by denying Swanner relief under state law.

The independent and adequate state ground doctrine only applies "[w]hen the outcome of a state court case could *not* be changed, even if the federal law issue were resolved differently by the United States Supreme Court. . . ." Justice O'Connor, *Our Judicial Federalism*, 35 Case W. Res. L. Rev. 1, 5 (1984) (emphasis in original).[3] Because the federal questions in this case predominate, it is of no consequence that the Alaska Court reviewed and

---

[1] 42 U.S.C. §§ 2000bb *et seq.*

[2] U.S. Constitution Article VI.

[3] *See also Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 566 (1977); *Herb v. Pitcairn*, 324 U.S. 117, 125-126 (1945).

rejected Swanner's arguments regarding the Alaska Constitution.

Principally, it is because the Alaska Court upheld the local governments' actions under state law that this Court has power to review the federal questions presented. "If . . . a state court upholds a particular state action on the ground that it offends *neither* federal nor state law, then the Supreme Court has power to review the state court judgment – though on the federal question only. Thus, a state court's rejection of both the federal and state due process challenges may be reviewed by the Supreme Court. The decision on the federal grounds in these circumstances could change the result in the case, since the Supreme Court's disagreement with the state court on the federal question would render the challenged state action unlawful." Justice O'Connor, 35 Case W. Res. L. Rev. at 6 *citing Ohio v. Johnson*, 467 U.S. 493, 497 n. 7 (1984) (emphasis in original).

It is axiomatic that the Alaska Court's incorporation of the federal *Sherbert/Yoder* compelling interest test into Alaska's state constitutional law does not defeat this Court's application of the controlling federal standard. Again, the simple explanation is that the federal questions predominate and, in the words of Justice O'Connor, "the Supreme Court's disagreement with the state court on the federal question would render the challenged state action unlawful." 35 Case W. Res. L. Rev. at 6.

Moreover, because the Alaska Court incorporated the *Sherbert/Yoder* compelling interest test into Alaska's constitutional law, the Alaska Court's judgment is not *independent* of federal law. *See Zacchini*, 433 U.S. at 568;[4] *accord* Justice O'Connor, 35 Case W. Res. L. Rev. at 6.

---

[4] In *Zacchini*, where the Ohio Supreme Court applied United States Supreme Court First Amendment precedents arguably as incorporated into Ohio's substantive state law, this Court held that "[e]ven if the judgment in favor of respondent must nevertheless be understood as ultimately resting on Ohio law, it appears that at the very least the Ohio court felt compelled by what it understood to be federal constitutional considerations to construe and apply its own law in the manner it did. In this event, we have jurisdiction and should decide the federal issue; for if the state court erred in its understanding of our cases and of the First and Fourteenth Amendments, we should so declare, leaving the state court free to decide the privilege issue solely as a matter of Ohio law." 433 U.S. at 568 *citing* and *quoting Perkins v. Benquet Cons. Min. Co.*, 342 U.S. 437, 441-43 (1952); *Missouri ex rel. Southern R. Co. v. Mayfield*, 340 U.S. 1, 5 (1950).

Finally, respondents' observation that the Alaska constitution affords greater protection to religious liberty than this Court's *Employment Division v. Smith*[5] decision is meaningless because it ignores both RFRA and the Supremacy Clause. RFRA moots *Smith* by creating a federal statutory protection for the free exercise of religion codifying the *Sherbert/Yoder* compelling interest test.[6] This Court's application of RFRA's compelling interest test has supremacy over the Alaska Court's decision. This Court's authority to apply or reexamine *Smith's* federal Constitutional interpretation also has supremacy over the Alaska Court's decision.

II. THERE IS SIGNIFICANT CONFLICT, DIRECT AND IN PRINCIPLE, BETWEEN THE ALASKA COURT'S DECISION AND THE DECISIONS OF COURTS FROM OTHER STATES SUFFICIENT TO WARRANT REVIEW BY THIS COURT

Each of the state courts which have analyzed the question of whether a private landlord can be compelled to rent to unmarried cohabitors despite her strong religious convictions against cohabitation and its facilitation, have done so through application of the *Sherbert/Yoder* compelling interest test. *See Swanner* (Petition App. 14,

---

[5] 494 U.S. 872 (1990).

[6] 42 U.S.C. §§ 2000bb(a); 2000bb-1(a); 2000bb-1(b).

18-21, 29-30 and n. 9); *Attorney General v. Desilets*, 636 N.E.2d 233, 236 (Mass. 1994);[7] *Minnesota v. French*, 460 N.W.2d 2, 9-10 (Minn. 1990);[8] *Smith v. Commission of Fair Empl. & Hous.*, 25 Cal. App. 4th 251, 30 Cal. Rptr. 2d 395, 402-05, *mod. reh'g den.*, 1994 Cal. App. LEXIS 649 (Cal. App. 1994).[9]

---

[7] The Massachusetts Supreme Court ruled "we prefer to adhere to the standards of earlier First Amendment jurisprudence . . . we used the balancing test that the Supreme Court had established under the free exercise of religion clause in *Wisconsin v. Yoder*, 406 U.S. 205, 215-229, 32 L. Ed. 2d 15, 92 S. Ct. 1526 (1972); *Sherbert v. Verner*, 371 U.S. 398, 406-409, 9 L. Ed. 2d 273, 83 S. Ct. 321 (1963); and subsequent opinions." *Desilets*, 636 N.E. 2d at 236. Respondents' point that the Massachusetts Constitution contains an extra and unique religion provision is meaningless. In *Desilets*, the Massachusetts Court expressly declined to analyze that extra and unique Constitutional provision. *Id.* at 242.

[8] The Minnesota Supreme Court ruled "we are compelled to conclude that French must be granted an exemption from the MHRA unless the state can demonstrate (sic) compelling and overriding state interest . . . the state has the duty to enforce a statute in the least restrictive way to accommodate religious belief. . . . " *French*, 460 N.W.2d at 9-10. Minnesota has adopted the *Sherbert/Yoder* compelling interest test as part of its state constitutional law. *See Minnesota v. Hershberger*, 462 N.W.2d 393, 396-99 (Minn. 1990).

[9] In *Smith v. Comm'n* the California Court of Appeals applied the *Sherbert/Yoder* compelling interest test as mandated by *Employment Division v. Smith*. 30 Cal. Rptr. 2d at 402-05. Under *Employment Division v. Smith* the California Court applied the compelling interest test because it found that there were hybrid Constitutional rights at issue (speech and religion). *Id.* Respondents' claim that *Smith v. Comm'n* is distinguishable from *Swanner* because the California case involved "hybrid" rights while the Alaska case did not is incorrect. Both *Smith v. Comm'n* and *Swanner* involved First Amendment speech because the landlords in both cases were ordered to post and distribute notices declaring that their religiously based conduct

Because the Alaska Court's interpretation and application of the *Sherbert/Yoder* compelling interest test is directly contrary to the Massachusetts, Minnesota and California Courts' interpretation and application of that test in identical factual circumstances, there is a conflict *in principle* among the states which should be resolved by this Court. Sup. Ct. R. 10.1(b).[10] The California Court of Appeals decision in *Smith v. Comm'n* actually presents a direct conflict with the Alaska Court's decision in *Swanner*.[11]

Moreover, the conflict *in principle* is amplified by the fact that under RFRA the *Sherbert/Yoder* compelling interest test is, once again, controlling federal law. It requires little foresight to conclude that, when given the opportunity to analyze RFRA in this factual setting, each of the Massachusetts, Minnesota and California Courts will reach exactly the opposite conclusion than that reached

---

is illegal. *Compare* Petition App. 112-13 to 30 Cal. Rptr. 2d at 402-05.

[10] The conflict *in principle* presented by this case, which is substantial and intolerable because it relates to the fundamental right to free exercise of religion, warrants this Court's review. *See Ivan Allen Co. v. United States*, 422 U.S. 617, 623-24 (1975) (certiorari granted on claimed "conflict in principle" with a district court opinion which had been summarily affirmed by the court of appeals); *Saxbe v. Washington Post Co.*, 417 U.S. 843, 846 (1974) ("an apparent conflict in approach"); *United States v. National Bank of Commerce*, 472 U.S. 713, 719 (1985) ("appeared to us to conflict, directly or in principle, with decisions of other Courts of Appeals"); *Oregon Dept. of Fish & Wildlife v. Klamath Tribe*, 473 U.S. 753, 764 (1985) ("appeared to conflict in principle").

[11] Both the *Smith v. Comm'n* and *Swanner* opinions address the controlling *federal* compelling interest test. It is of no consequence that the California Court applied the test in *Smith v. Comm'n* based upon an *Employment Division v. Smith* "hybrid right" analysis while the Alaska Court applied the test under RFRA. By either analysis the test is the same, and the two courts' conclusions are opposite and directly conflicting.

by the Alaska Court. The interpretation and application of the compelling government interest test under RFRA presents an important federal question which has not been, but which should be, reviewed by this Court. Sup. Ct. R. 10.1(c).

III. CONGRESS PROPERLY ENACTED RFRA PURSUANT TO ITS LEGISLATIVE POWER UNDER SECTION 5 OF THE FOURTEENTH AMENDMENT[12]

Respondents' challenge to RFRA's constitutionality is both misconceived and incorrect. Respondents' challenge is misconceived because Swanner does not argue that RFRA "overrules" *Smith;* Congress did not intend RFRA to "overrule" *Smith;* and RFRA does not purport to "overrule" *Smith.* Respondents' challenge is incorrect because Congress has the power to enact RFRA.

A. Respondents' Challenge To RFRA's "Overruling" Of Smith Is Misconceived. Swanner does not argue that RFRA "overrules" *Smith.* (*Petition* at 8, 10, 14-16, 27). More significantly, Congress did not enact RFRA as an intended "overruling" of *Smith.* The Senate Judiciary Committee Report describes RFRA as a *response* to *Smith* which creates a *statutory,* rather than Constitutional, protection for the free exercise or religion.[13] Contrary to respondents' suggestion, RFRA does not interpret the Constitution and does not purport to create Constitutional law. Rather, RFRA creates statutory law which provides a higher level of protection for the free exercise

---

[12] Respondents' arguments regarding RFRA's constitutionality should not be considered by this Court because they were not pressed or passed upon below. *See Illinois v. Gates,* 462 U.S. 213, 221-24 (1983); *accord Cohen v. Cowles Media Co.,* 501 U.S. 663, ___, 111 S. Ct. 2513, 2517 (1991).

[13] Senate Report (Jud. Comm.) No. 103-111 *reprinted in* 1993 U.S. Code, Cong. & Ad. News 1892, 1893, 1904.

of religion than is afforded by the Free Exercise Clause of the First Amendment pursuant to this Court's controlling Constitutional interpretation in *Smith.*[14]

B. Respondents' Challenge To Congress' Power To Enact RFRA Is Incorrect. Congress can exercise its Fourteenth Amendment enforcement power to statutorily expand the measure of protection afforded the fundamental liberties embodied within the Fourteenth Amendment to levels beyond that previously afforded by this Court's Constitutional interpretation. Section 5 of the Fourteenth Amendment authorizes Congress "to enforce, by appropriate legislation, the provisions" of the Amendment. Section 5 gives Congress "the same broad powers expressed in the necessary and proper clause" with respect to state governments and their subdivisions. *Katzenbach v. Morgan,* 384 U.S. 641, 650 (1966). " 'Whatever legislation is appropriate, that is, adapted to carry out the objects the Amendments have in view,' " is within the power of Congress, unless prohibited by some other provision of the Constitution. *Id. quoting Ex Parte Virginia,* 100 U.S. 339, 345 (1879). The Fourteenth Amendments's "fundamental concept of liberty . . . encompasses the liberties guaranteed by the First Amendment," which of course include the right to practice one's faith free of laws prohibiting the free exercise of religion. *Cantwell v. Connecticut,* 310 U.S. 296, 303 (1940).

This principle is best exemplified by *Katzenbach.* In *Katzenbach* this Court upheld section 4(e) of the Voting Rights Act of 1965, enacted under Section 5 of the Fourteenth Amendment, which prohibits state English literacy requirements for voters. This Court upheld Congress' enactment of section 4(e) of the Voting Rights Act even though the Court had earlier rejected a Fourteenth

---

[14] Irrespective of RFRA, *Smith* remains controlling law regarding the Free Exercise Clause of the First Amendment. *Smith* is moot, however, because RFRA provides more protection for free exercise than does the First Amendment.

Amendment Equal Protection challenge to state literacy requirements for voters. *Katzenbach,* 384 U.S. at 648-49 *citing Lassiter v. Northampton County Bd. of Election,* 360 U.S. 45 (1959).

Likewise, in *Oregon v. Mitchell,* 400 U.S. 112, 118-19 (1970), a unanimous Court agreed that Congress could impose a nationwide ban on literacy tests for voters despite the Court's earlier decision in *Lassiter* that such tests did not violate the Equal Protection Clause. Later, in *Fullilove v. Klutznick,* 448 U.S. 448, 476-78 (1980), this Court upheld Congress' use of its Fourteenth Amendment enforcement power to establish affirmative action quotas for minority business participation in public construction projects, even though the Court had earlier held that the Fourteenth Amendment prohibits only purposeful discrimination.[15]

---

[15] This Court's past opinions are replete with examples of the Court's affirmance of Congress' power to enact statutory protections for Constitutionally protected rights at levels higher than that afforded by the Court's prior Constitutional interpretations. For example, in *Metro Broadcasting, Inc. v. F.C.C.,* 497 U.S. 547, 565-66 (1990) this Court approved the FCC's minority ownership programs, which were specifically mandated by Congress, despite the Court's earlier decision in *Richmond v. J.A. Croson Co.,* 488 U.S. 469, 490 (1989) disapproving on Equal Protection grounds, a municipality minority set-aside program. In *E.E.O.C. v. Wyoming,* 460 U.S. 226, 243 (1983) Justice Brennan, joined by Justices Marshall, Blackmun, and Stevens upheld Congress' enactment of legislation, under the auspices of the Commerce Clause, making age discrimination unlawful despite the Court's earlier ruling that age classifications are allowed under Equal Protection analysis if supported by a rational basis. *See Massachusetts Board of Retirement v. Murgia,* 427 U.S. 307, 313 (1976). In *Board of Education v. Mergens,* 496 U.S. 226, 247-53 (1990), this court upheld Congress' enactment of the Equal Access Act (hereafter "EAA" 20 U.S.C. §§ 4071 *et seq.*) under Section 5 of the Fourteenth Amendment. The EAA was designed to expand this Court's prior interpretation of free speech and

Congress properly enacted RFRA pursuant to its Constitutional power granted by Section 5 of the Fourteenth Amendment to ensure protection of the fundamental concepts of liberty (*i.e.,* the free exercise of religion) which are embodied within the Fourteenth Amendment.[16]

---

free exercise rights under the First Amendment in relationship to the Establishment Clause as defined by this Court in *Widmar v. Vincent,* 454 U.S. 263, 271-75 (1981). Also, the Americans with Disabilities Act of 1990 provides greater protection to disabled persons than does the Equal Protection Clause of the Fourteenth Amendment. *Compare* 42 U.S.C. §§ 12101 *et seq.* (which defines and prohibits discrimination against disabled individuals) with *City of Cleburne v. Cleburne Living Center,* 473 U.S. 532, 440-446 (1985) (which holds that classifications based upon mental handicap are allowed if they are rationally related to a legitimate governmental purpose). As another example, Title VII provides a higher level of protection against gender discrimination than does the Equal Protection Clause of the Fourteenth Amendment. *Compare* 42 U.S.C. § 2000e-2 (which defines sex discrimination and makes it unlawful) with *Wengler v. Druggists Mut. Ins. Co.,* 446 U.S. 142, 150 (1980); and *Mississippi University for Women v. Hogan,* 458 U.S. 718, 724 (1982) (which rule that under the Equal Protection Clause gender classifications are allowed if they are substantially related to a sufficiently important governmental interest).

[16] Respondents reliance upon *Marbury v. Madison,* 5 U.S. 137, 177 (1803) is misplaced. *See* L. Tribe, *American Constitutional Law,* § 5-14, p. 349 (2d ed. 1988) ("Judicial review does not require that the Constitution always be equated with the Supreme Court's view of it. It is the Court's responsibility, under *Marbury,* to strike down acts of Congress which the Court concludes to be unconstitutional – nothing more. *Marbury* implies nothing about the criteria by which the Court should determine whether an act of Congress is constitutional; it requires only that such criteria should exist. Criteria which invalidate all legislation founded on interpretations of the Fourteenth Amendment different from those of the Supreme Court, therefore, are no more consistent with *Marbury* than criteria which allow Congress to adopt any plausible interpretation of

Respondents' assertion that RFRA represents an improper use of Congress' legislative power is meritless.

CONCLUSION

For the reasons stated, the Court should grant the petition for a writ of certiorari to the Supreme Court of the State of Alaska.

Respectfully submitted,

KEVIN G. CLARKSON
PERKINS COIE
1029 West Third Ave.
Suite 300
Anchorage, AK 99501
(907) 279-8561

Attorney for Petitioner
Tom Swanner d/b/a
Whitehall Properties

Dated: September 7, 1994

---

the fourteenth amendment; since both sets of criteria fix limits on congressional power, albeit of differing degrees of severity, both do justice to *Marbury*, and neither jeopardizes the principle of judicial review").